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September 15, 2000

Ms. Magalie Roman Salas
Secretary
Federal Communications Commission
445 12th Street, SW
Washington, D.C. 20554

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FEDERAL COMMUNICATIONS COMMISSION
OFFICE OF THE SECRETARY

Re: Ex Parte Presentation
CC Docket No. 96-98 Implementation of the Local Competition
Provisions in the Telecommunications Act of 1996
CC Docket No. 99-68 Inter-Carrier Compensation for
ISP-Bound Traffic

Dear Ms. Salas:

On September 14, 2000, David Hostetter and I met with Christopher Wright, Jonathan Nuechterlein, Paula Silberthau and Debra Weiner of the General Counsel's Office to discuss the above referenced proceeding. The attached served as the basis for our discussion.

Respectfully Submitted,

Gary Phillips

Attachment

cc: C. Wright
J. Nuechterlein
P. Silberthau
D. Weiner

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RECIPROCAL COMPENSATION
FOR ISP-BOUND TRAFFIC

I. THE END-TO-END ANALYSIS IS CONTROLLING.

A. THE END-TO-END ANALYSIS IS NOT JUST A JURISDICTIONAL TOOL, BUT AN ANALYTICAL CONSTRUCT USED TO DEFINE THE BOUNDARIES OF A COMMUNICATION FOR JURISDICTIONAL OR REGULATORY PURPOSES.

- The Commission has applied the end-to-end analysis every time it has been called upon to determine the end points of a communication, including in disputes having nothing to do with jurisdiction.
- *Teleconnect v. Bell Telephone Co.*: the Commission applied end-to-end analysis in rejecting arguments that an 800 call used to connect to an IXC switch was a separate communication for purposes of the access charge regime from the long-distance call placed from that switch.

Both the Bureau and the Commission expressly recognized that there is no basis for limiting end-to-end principles to jurisdictional determinations:

CCB: "Just as Commission regulation does not end with an intermediate switch, neither does the character of [a] call change at [an] intermediate switch."

FCC: "While Nevada Bell and Pacific Bell attempt to distinguish the so-called 'jurisdictional' nature of a call from its status for 'billing' purposes, they present no persuasive argument nor any authority to support their contention that this distinction has legal significance."

- *International Telecharge, Inc. v. SWBT et al.*: FCC held that an 800 call used to access an operator service center was, for access charge purposes, part of a single-end-to-end communication (11 FCC Rcd 10061).
- *Bill Correctors, Inc. v. Pacific Bell*, FCC applied end-to-end analysis in determining status of FX traffic under the access charge regime (10 FCC Rcd 2305).
- *AT&T Corp. Bell Atlantic-PA*: FCC applied end-to-end analysis in holding that "a call redirected by call forwarding does not terminate at the location dialed by the caller" and thus does not warrant the application of "intermediate" CCL charges (14 FCC Rcd 556).

- *Request by RCN Telecom Services and Bell Atlantic for Clarification:* FCC applied end-to-end analysis in holding that Bell Atlantic is not providing interLATA service when it hands off traffic to a CLEC across LATA boundaries if the ultimate beginning and end points of the communication are in the same LATA (14 FCC Rcd 13861).

- If end-to-end principles were limited to the jurisdictional status of ISP-bound traffic, the jurisdictional status of that traffic would not coincide with the FCC's authority to establish a rate regime for that traffic. That would be flatly inconsistent with section 251(i), which provides "[n]othing in this section shall be construed to limit or otherwise affect the Commission's authority under section 201.

B. THE END-TO-END ANALYSIS APPLIES AS MUCH TO ISP-BOUND TRAFFIC AS TO TRADITIONAL LONG-DISTANCE VOICE TRAFFIC.

- End-to-end analysis is used to gauge the boundaries of all types of communications by wire and radio, not just traditional long-distance voice traffic:
 - *Idaho Microwave, Inc. v. FCC* (applying end-to-end analysis to television signals carried on microwave facilities) (352 F.2d 729)
 - *General Telephone Co. v. Calif.* (applying end-to-end analysis to cable television programming distributed over telephone company lines) (413 F.2d 390)
- CLECs effectively concede that the end-to-end analysis applies to Internet communications because they concede that ISP-bound traffic is jurisdictionally interstate under that analysis.

C. THE FACT THAT ISPS ARE CLASSIFIED AS INFORMATION SERVICE PROVIDERS DOES NOT MEAN THAT ISP-BOUND TRAFFIC TERMINATES AT THE ISP SERVER.

- Since 1983, the FCC has recognized that LECs provide access service when they deliver traffic to an ESP. Access service is defined in FCC rules as "services and facilities provided for the origination and termination of any interstate or foreign telecommunication." (47 CFR § 69.2) Thus, for 17 years, the FCC has recognized that telecommunications does not terminate upon delivery of traffic to an ESP.
- This makes good sense: an information service is nothing more than a telecom service with added functionality. Thus a telecom service underlies every information service.

- The fact that under FCC regulations, ISPs are generally treated as users, not providers, of telecom services does not mean, as the court suggested, that ISPs are no different from other communications-intensive businesses, such as pizza delivery firms, travel agents, etc. Unlike these other businesses, ISPs do not merely use telecommunications to conduct their businesses; they forward subscriber-initiated communications to destinations on the Internet.
- In this respect, the Court's suggestion that ISPs originate communications on behalf of their subscribers was wrong.
 - See e.g., *Advanced Services Remand Order* at ¶ 35: "the service provided by the local exchange carrier to the ISP is ordinarily exchange access service because it enables the ISP to transport the communication initiated by the end-user subscriber located in one exchange to its ultimate destination in another exchange."
- The fact that telecom services and information services are deemed mutually exclusive regulatory categories is a red herring.
 - It means only that a provider of an information service is not considered a provider of a telecommunications service by virtue of the telecommunications underlying its information service. (*Universal Service Report*, ¶ 57) It does not mean that the telecommunications services underlying the information service does not exist at all.
 - In fact, the FCC requires the provider of this telecom service to contribute to universal service support mechanisms. It even left open the possibility that the ISP itself might be required to contribute to universal service support to the extent it provides its own backbone services.
 - In *BellSouth MemoryCall Order*, FCC squarely held that, for purposes of determining the boundaries of a communication, a telecom service that connects to an information service is no different from an ordinary phone call:

"When a caller is connected to BellSouth's voice mail service ... there is a continuous path of communications across state lines between the caller and the voice mail service, just as there is when a traditional out-of-state long distance voice telephone call is forwarded b the local switch to another location in the state and answered by a person, a message service bureau or customer premises answering device." (7 FCC Rcd 1619, ¶ 9 (emphasis added))

- D. ISP-BOUND TRAFFIC DOES NOT TERMINATE AT THE ISP SERVER UNDER SECTION 51.701(d) OF THE COMMISSION'S RULES.
- While § 51.701(d) describes the termination "function" in order to distinguish that "function" from the "transport" function (*see Local Competition Order* at ¶ 1040), "termination" is not defined solely with respect to functionality, as CLECs claim. Rather, under the express terms of the rule, the termination functionality must be provided in connection with "local telecommunications traffic" that is delivered to the "called party."
 - In the *Local Competition Order*, the Commission rejected a purely functional definition of "termination," noting that under such a definition, access traffic, as well as local traffic, would be subject to reciprocal compensation. (¶ 1033)
 - ISP-bound traffic is not "local telecommunications traffic."
 - CLEC claim that the definition of "termination" should be bootstrapped into the definition of "local telecommunications traffic" – such that "local telecommunications traffic" is simply traffic for which the "terminating" and "originating" functionalities are performed within the same local calling area – goes too far: if that were true, an access code call delivered to an IXC within the end user's local calling area would likewise be subject to reciprocal compensation, in express violation of the Commission's stated policy.
 - The ISP is not the "called party."
 - While consumers use an ISP as a conduit through which to send and receive transmissions over the Internet, their intent is not to communicate with the ISP, but to send and receive information to and from the Internet. *E.g.*, a user that sends an e-mail or that participates in on-line chat is communicating with the person to whom the e-mail is addressed or with those in the "chat room", not her ISP. Likewise, a user that sends or retrieves information to or from a web site is communicating with the proprietor of that site, not her ISP.
 - ISP-bound traffic could not be interstate if the ISP were the called party. Rather, there would be two separate calls, the first of which would be jurisdictionally intrastate.
 - In *Teleconnect v. Bell Telephone Co.*, the FCC specifically referred to the person at the ultimate end point of the communication – not the intermediate switching point – as the "called party."
 - AT&T agrees that § 51.701(d) "in no way purports to define what traffic is 'local' and what traffic is 'non-local.'"

E. THE APPLICATION OF RECIPROCAL COMPENSATION TO ISP-BOUND TRAFFIC WOULD NOT BE CONSISTENT WITH THE ACCESS CHARGE EXEMPTION.

- Reciprocal compensation is paid for local traffic because local calls are assumed to be "sent-paid" calls – *i.e.*, it is assumed that (1) the calling party has paid the originating carrier for call completion (originating and terminating functions), and that (2) the called party has paid nothing to the terminating carrier to receive the local call.
- Although the FCC has exempted ISPs from paying Part 69 access charges for the access services they use, the FCC did not establish a "sent-paid" model for ISP-bound traffic. To the contrary, the FCC simply changed the amount of money ESPs must pay for the access services they use.
- Specifically, instead of paying Part 69 access charges, ESPs were obligated to pay: (1) business line or other state tariffed charges; (2) the subscriber line charge; (3) special access surcharges for each private line channel they use.
- All three of these sources of revenue are paid by the ISP to its LEC. None is paid to the originating LEC if the originating LEC does not serve the ISP. Thus, although the access charge exemption altered the amount of money the ISP pays for its access service, it did not transform the compensation methodology into the sent-paid methodology used for local traffic.
 - The FCC has repeatedly recognized that ISPs, not end users, pay for the access services used by ISPs. In fact, in one of the original access charge orders, the FCC noted that the local business line rates paid by ESPs are deemed to recover the cost not only of the line between the ESP and the LEC switch, but also the switching function used to deliver interstate traffic to the ESP. (97 FCC2d 682 ¶ 88)
 - In its 1987 NPRM proposing to lift the ESP exemption, the FCC reiterated its understanding that ESPs pay for the access services they use, expressing concern that "the charges currently paid by enhanced service providers do not contribute sufficiently to the costs of the exchange access facilities they use[.]" (2 FCC Rcd. 682, ¶ 88)
 - Moreover, when, in the *Access Reform Proceeding* in 1997, ILECs argued that they were unable to recover their costs associated with ISP-bound traffic as a result of the access charge exemption, the FCC stated that if this were the case, they should raise the rates they charge ISPs. (12 FCC Rcd. at 16134)
 - The D.C. Circuit also has recognized that ISPs – not the originating end users - pay for the access service they receive. In its order upholding the exemption it stated that "the access charges paid by ...ESPs may thus not fully reflect their relative use of exchange access." (*NARUC v. FCC*, 737 F.2d at 1136)

- That ISPs pay for the access services they use is not just a matter of regulatory theory or legal construct.
 - CLECs who serve ISPs perform one function only for those ISPs: they deliver incoming traffic. Thus, it is impossible to view the revenues paid by the ISP as anything but payment for the receipt of traffic.

→ IN SHORT, WHEN A CLEC WINS AN ISP AS CUSTOMER, THE CLEC LIKEWISE WINS THE REVENUE ASSOCIATED WITH THE ISP-BOUND TRAFFIC. TO BE SURE, ILECS CONTINUE TO RECEIVE FLAT-RATED LOCAL SERVICE REVENUES FROM THEIR CUSTOMERS BUT: (1) THESE REVENUES HAVE NEVER BEEN VIEWED AS COMPENSATION FOR ISP ACCESS; (2) THEY ARE NOT COMPENSATORY EVEN FOR THE ORIGINATING FUNCTIONALITY, MUCH LESS THE ORIGINATING AND "TERMINATING" FUNCTIONALITIES. LOCAL RATES HAVE NOT CHANGED BECAUSE OF ISP TRAFFIC, EVEN AS ISP TRAFFIC IS DOUBLING EVERY 100 DAYS.

F. THE COMMISSION HAS NEVER RETREATED FROM THE VIEW THAT ISP-BOUND TRAFFIC IS ACCESS TRAFFIC.

- In stating in the *Access Reform Order* "it is not clear that ISPs use the public switched network in a manner analogous to IXCs," the Commission in no way implied that ISPs do not, in fact, use access services. Rather, at most the FCC was suggesting that ISPs *may* use the network in ways that warrant a different kind of access *pricing* structure than is used for long-distance services.
 - In fact, that is exactly what the FCC said: "The access charge system was designed for basic voice telephony provided over a circuit-switched network, and even when stripped of its current inefficiencies it may not be the most appropriate pricing structure for Internet access and other information services. (12 FCC Rcd at 16134)

II. THE STATUS OF ISP-BOUND TRAFFIC AS EXCHANGE ACCESS OR TELEPHONE EXCHANGE SERVICE HAS NO BEARING ON WHETHER IT IS SUBJECT TO RECIPROCAL COMPENSATION.

- Neither §251(b)(5), nor the Commission's reciprocal compensation rules apply by their terms to "telephone exchange service. Rather, they apply to "local telecommunications traffic" – a term that is defined differently from the term "telephone exchange service." Thus, it does not matter, for reciprocal compensation purposes whether ISP-bound traffic fits the statutory definition of telephone exchange service.
- In any event, the Commission has now ruled that ISP-bound traffic is exchange access, and that ruling is entitled to *Chevron* deference.
 - Another reason, not cited by the FCC, for classifying ISP-bound traffic as exchange access is that consumers can use ISP access for IP telephony, which is indisputably telephone toll service for which a separate fee is paid.